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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BRIAN LEE PHILLIPPE,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Acting
15 Commissioner of the Social Security
16 Administration,

Defendant.

CASE NO. 14-cv-05968 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States Magistrate Judge, Dkt. 4). This matter has been fully briefed (*see* Dkt. 10, 12, 13).

After considering and reviewing the record, the Court concludes that the ALJ did not err in failing to properly determine plaintiff's severe impairments because plaintiff did not establish his eye blurriness to be a medically determinable impairment. Further,

1 the ALJ provided clear and convincing reasons for discounting plaintiff's testimony. The
2 ALJ did not err then in assessing plaintiff's RFC. Therefore, this matter is affirmed
3 pursuant to sentence four of 42 U.S.C. § 405(g).

4 BACKGROUND

5 Plaintiff, BRIAN LEE PHILLIPPE, was born in 1964 and was 45 years old on the
6 alleged date of disability onset of January 20, 2010 (*see AR. 191-97*). Plaintiff dropped
7 out of high school, but did obtain his GED (AR. 49). He has work experience as a
8 carpenter but has not worked since he was injured on the job (AR. 43-48, 256-71).

9 According to the ALJ, plaintiff has at least the severe impairments of "right knee
10 arthrofibrosis, status post anterior cruciate ligament (ACL) reconstruction; hypertension;
11 elevated body mass index; major depression, moderate, untreated; and alcohol abuse (20
12 CFR 404.1520(c))" (AR. 23).

14 At the time of the hearing, plaintiff was divorced and living with his 22-year-old
15 son in a mobile home (AR. 52-53).

16 PROCEDURAL HISTORY

17 Plaintiff's application for disability insurance ("DIB") benefits pursuant to 42
18 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
19 reconsideration (*see AR. 90-102, 104-17*). Plaintiff's requested hearing was held before
20 Administrative Law Judge Michael C. Blanton ("the ALJ") on May 16, 2013 (*see AR.*
21 *39-88*). On May 24, 2013, the ALJ issued a written decision in which the ALJ concluded
22 that plaintiff was not disabled pursuant to the Social Security Act (*see AR. 18-37*).
23

1 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the
2 Commissioner err by failing to properly determine the severe impairments; (2) Did the
3 Commissioner err in determining plaintiff's credibility; and (3) Did the Commissioner err
4 in determining plaintiff's RFC (*see* Dkt. 10, p. 2).

5 STANDARD OF REVIEW

6 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
7 denial of social security benefits if the ALJ's findings are based on legal error or not
8 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
9 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
10 1999)).

11 DISCUSSION

12 **(1) Did the Commissioner err by failing to properly determine the severe
13 impairments?**

14 Plaintiff contends that the ALJ erred by failing to determine that plaintiff's
15 bilateral eye blurriness was a severe impairment (*see* Opening Brief, Dkt. 10, pp. 4-6).
16 Bilateral eye blurriness was not one of the severe impairments the ALJ found at step two
17 of the sequential evaluation process, nor was there any discussion of such an impairment
18 in the ALJ's analysis at step two (*see* AR. 23).

20 Step two of the administration's evaluation process requires the ALJ to determine
21 if the claimant "has a medically severe impairment or combination of impairments."
22 *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citation omitted); 20 C.F.R. §
23 404.1520(a)(4)(ii) (1996). The ALJ "must consider the combined effect of all of the
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1 claimant's impairments on her ability to function, without regard to whether [or not] each
 2 alone was sufficiently severe." *Smolen, supra*, 80 F.3d at 1290 (citations omitted). The
 3 step-two determination of whether or not a disability is severe is merely a threshold
 4 determination, raising potentially only a "prima facie case of a disability." *Hoopai v.*
 5 *Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007) (*citing Tackett v. Apfel*, 180 F.3d 1094, 1100
 6 (9th Cir. 1999)).

7 An impairment is "not severe" if it does not "significantly limit" the ability to
 8 conduct basic work activities. 20 C.F.R. § 404.1521(a). Basic work activities are
 9 "abilities and aptitudes necessary to do most jobs," including, for example, "walking,
 10 standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; capacities for
 11 seeing, hearing and speaking; understanding, carrying out, and remembering simple
 12 instructions; use of judgment; responding appropriately to supervision, co-workers and
 13 usual work situations; and dealing with changes in a routine work setting." 20 C.F.R. §
 14 404.1521(b). "An impairment or combination of impairments can be found 'not severe'
 15 only if the evidence establishes a slight abnormality that has 'no more than a minimal
 16 effect on an individual[']s ability to work.'" *Smolen, supra*, 80 F.3d at 1290 (*quoting*
 17 Social Security Ruling "SSR" 85-28) (*citing Yuckert v. Bowen*, 841 F.2d 303, 306 (9th
 18 Cir. 1988)). The step-two analysis is "a *de minimis* screening device to dispose of
 19 groundless claims," when the disability evaluation process ends at step two. *Smolen,*
 20 *supra*, 80 F.3d at 1290 (*citing Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)).

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 22 Regarding the establishment of a disability, it is the claimant's burden to
 23 "furnish[] such medical and other evidence of the existence thereof as the Secretary may
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1 require.”” *Yuckert, supra*, 482 U.S. at 146 (quoting 42 U.S.C. § 423(d)(5)(A)) (citing
2 *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976)) (footnote omitted).

3 The Court notes that plaintiff bears the burden to establish by a preponderance of
4 the evidence the existence of a severe impairment that prevented performance of
5 substantial gainful activity and that this impairment lasted for at least twelve continuous
6 months. 20 C.F.R. §§ 404.1505(a), 404.1512(a) and (c); *Yuckert, supra*, 482 U.S. at 146;
7 *see also Tidwell, supra*, 161 F.3d at 601 (citing *Roberts v. Shalala*, 66 F.3d 179, 182 (9th
8 Cir. 1995)). The existence of a medically determinable impairment “must be established
9 by medical evidence consisting of signs, symptoms, and laboratory findings.” *Ukolov v.*
10 *Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005) (citing SSR 96-4p); 20 C.F.R. § 404.1508.
11 Only acceptable medical sources may diagnose and establish that a medical impairment
12 exists. 20 C.F.R. § 404.1513(a).

14 Here, plaintiff supports his contention of a severe impairment with a citation to
15 one page in the medical record in which an evaluating physician noted in the history
16 section of a report that plaintiff is “[complaining of] bilateral eye blurriness for 1 – 1 ½
17 years” (see Opening Brief, Dkt. 10, p. 4; AR. 759). The record contains no diagnosis of
18 an eye impairment based on signs, symptoms, or laboratory findings; it only contains a
19 complaint that was recorded in plaintiff’s medical history. “[U]nder no circumstances
20 may the existence of an impairment be established on the basis of symptoms alone.”
21 *Ukolov, supra*, 420 F.3d at 1005. Moreover, plaintiff acknowledged at the hearing that he
22 had not sought treatment for any eye impairment (see AR. 51). The ALJ reasonably
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1 found no medically determinable vision impairment because the record did not contain a
2 diagnosis by an acceptable medical source.

3 Plaintiff argues that under SSR 96-3p, a determination that a claimant's
4 impairment is not severe requires a careful evaluation of medical findings and a judgment
5 about the resulting limitations, which was missing here. However, before the
6 determination of whether or not an impairment is severe occurs, SSR 96-3p requires the
7 claimant to establish that the impairment exists by objective medical evidence. SSR 96-
8 3p, 1996 SSR LEXIS 10 at *2. Plaintiff did not provide such evidence here.
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10 Plaintiff further contends that any affirmation of the ALJ's decision not to discuss
11 the alleged impairment would be a post hoc rationalization because review of the ALJ's
12 decision must be based on actual findings offered by the ALJ (*see* Opening Brief, Dkt.
13 10, p. 5). However, the ALJ need not discuss all evidence presented to him but must only
14 explain why "significant probative evidence has been rejected." *Vincent on Behalf of*
15 *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (per curiam) (*quoting Cotter*
16 *v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981)). Plaintiff's complaint of eye blurriness
17 did not establish an impairment and therefore was not significant probative
18 evidence. A claimant denied disability may not buy a free remand by raising any issue so
19 insignificant that the ALJ did not discuss it, and then attempt to bind the reviewing
20 court's hands from positing explanations for the ALJ's silence. The ALJ reasonably did
21 not find a medically determinable vision impairment and was under no obligation to
22 discuss it.
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(2) Did the Commissioner err in determining plaintiff's credibility?

Plaintiff contends that the ALJ erred in stating that plaintiff's allegations were not fully credible (*see* Opening Brief, Dkt. 10, pp. 6-7). The ALJ found plaintiff's allegations not to be fully credible for several reasons: inconsistency with the medical evidence, lack of treatment for alleged mental health issues, and inconsistency with plaintiff's daily activities (*see* AR. 29).

If the medical evidence in the record is not conclusive, sole responsibility for resolving conflicting testimony and questions of credibility lies with the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (*citing Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971); *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980)). An ALJ is not “required to believe every allegation of disabling pain” or other non-exertional impairment. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (*citing* 42 U.S.C. § 423(d)(5)(A) (other citations and footnote omitted)). Even if a claimant “has an ailment reasonably expected to produce *some* pain; many medical conditions produce pain not severe enough to preclude gainful employment.” *Fair, supra*, 885 F.2d at 603. The ALJ may “draw inferences logically flowing from the evidence.” *Sample, supra*, 694 F.2d at 642 (*citing Beane v. Richardson*, 457 F.2d 758 (9th Cir. 1972); *Wade v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)). However, an ALJ may not speculate. *See SSR 86-8, 1986 SSR LEXIS 15 at *22.*

Nevertheless, the ALJ's credibility determinations "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (*citing Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*))). In evaluating a claimant's

1 credibility, the ALJ cannot rely on general findings, but “must specifically identify what
2 testimony is credible and what evidence undermines the claimant's complaints.”” *Greger*
3 *v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (*quoting Morgan v. Comm'r of Soc. Sec.*
4 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)); *Reddick, supra*, 157 F.3d at 722 (citations
5 omitted); *Smolen, supra*, 80 F.3d at 1284 (citation omitted).

6 The determination of whether or not to accept a claimant's testimony regarding
7 subjective symptoms requires a two-step analysis. 20 C.F.R. § 404.1529; *Smolen, supra*,
8 80 F.3d at 1281-82 (*citing Cotton v. Bowen*, 799 F.2d 1407-08 (9th Cir. 1986)). First, the
9 ALJ must determine whether or not there is a medically determinable impairment that
10 reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §
11 404.1529(b); *Smolen, supra*, 80 F.3d at 1281-82. Once a claimant produces medical
12 evidence of an underlying impairment, the ALJ may not discredit then a claimant's
13 testimony as to the severity of symptoms based solely on a lack of objective medical
14 evidence to corroborate fully the alleged severity of pain. *Bunnell, supra*, 947 F.2d at
15 343, 346-47 (*citing Cotton, supra*, 799 F.2d at 1407).
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17 If an ALJ rejects the testimony of a claimant once an underlying impairment has
18 been established, the ALJ must support the rejection “by offering specific, clear and
19 convincing reasons for doing so.” *Smolen, supra*, at 1284 (*citing Dodrill v. Shalala*, 12
20 F.3d 915, 918 (9th Cir. 1993)); *see also Reddick, supra*, 157 F.3d at 722 (*citing Bunnell,*
21 *supra*, 947 F.2d at 343, 346-47). The Court notes that this “clear and convincing”
22 standard recently was reaffirmed by the Ninth Circuit:
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Indeed, the cases following *Bunnell* read it as supplementing the “clear and convincing” standard with the requirement that the reasons also must be “specific.” (Internal citation to *Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1995)). Our more recent cases have combined the two standards into the now-familiar phrase that an ALJ must provide specific, clear, and convincing reasons. (Internal citation to *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). There is no conflict in the caselaw, and we reject the government’s argument that *Bunnell* excised the “clear and convincing” requirement. We therefore review the ALJ’s discrediting of Claimant’s testimony for specific, clear, and convincing reasons.

Burrell v. Colvin, 775 F.3d 1133, 1137 (9th Cir. 2014); *see also Garrison v. Colvin*, 759 F.3d 995, 1015 n.18 (9th Cir. 2014) (“The government’s suggestion that we should apply a lesser standard than ‘clear and convincing’ lacks any support in precedent and must be rejected”).

As with all of the findings by the ALJ, the specific, clear and convincing reasons also must be supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); *see also Bayliss, supra*, 427 F.3d at 1214 n.1 (*citing Tidwell, supra*, 161 F.3d at 601). That some of the reasons for discrediting a claimant’s testimony should properly be discounted does not render the ALJ’s determination invalid, as long as that determination is supported by substantial evidence. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

Plaintiff argues that the ALJ discounting plaintiff’s credibility due to inconsistency with his daily activities is not clear and convincing because it is not supported by evidence in the record. However, plaintiff does not challenge the ALJ making an adverse credibility finding based on inconsistency with the medical evidence and lack of treatment for mental health issues.

1 As outlined by the ALJ, plaintiff's allegations about severe knee pain were
2 inconsistent with the medical evidence (*see AR. 29*). Dr. Spencer Coray, M.D., found no
3 effusion, mild tenderness, and stable ligaments in the knee, with only a mild gait
4 disturbance (*see AR. 445-47*). Dr. Joseph Elias, M.D., found decreased range of motion
5 in the knee but with full strength, intact sensation, and no swelling or tenderness (*see AR.*
6 464).
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8 The ALJ also found that plaintiff's allegations related to memory and
9 concentration impairments were inconsistent with the medical evidence (*see AR. 29*). Dr.
10 Pamela Moslin, M.D., found plaintiff's memory grossly intact and found his
11 concentration mildly distracted but generally "focused and energized" (*see AR. 458*). Dr.
12 Douglas Robinson, M.D., found plaintiff's memory and cognitive function to be within
13 normal limits (*see AR. 749*). The ALJ reasonably discounted plaintiff's credibility for
14 these inconsistencies.

15 Although an ALJ may not discredit a plaintiff's testimony as not supported by
16 objective medical evidence once evidence demonstrating an impairment has been
17 provided, *Bunnell, supra*, 947 F.2d at 343, 346-47 (*citing Cotton, supra*, 799 F.2d at
18 1407), an ALJ may discredit a plaintiff's testimony when it contradicts evidence in the
19 medical record. *See Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995). In *Johnson*,
20 the Ninth Circuit reasoned as follows:
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22 The ALJ also identified several contradictions between claimant's
23 testimony and the relevant medical evidence and cited several instances
24 of contradictions within the claimant's own testimony. We will not
reverse credibility determinations of an ALJ based on contradictory or
ambiguous evidence. (*Internal citation to*

1 577, 579 (9th Cir. 1984)).

2 In addition to the inconsistencies within claimant's testimony, the ALJ
 3 noted the absence of medical treatment for claimant's back problem
 4 between 1983 and October 23, 1986, suggesting that if the claimant had
 5 actually been suffering from the debilitating pain she claimed she had,
 6 she would have sought medical treatment during that time.

7 *Id.* Here, the ALJ found contradictions between plaintiff's testimony and the medical
 8 evidence, citing several instances. Then, the ALJ also discounted plaintiff's testimony
 9 because plaintiff sought no treatment for his alleged mental health impairments (*see AR.*
 10 29). *See Tommasetti v. Astrue*, 533 F.3d 1035, 39 (9th Cir. 2008) (ALJ may consider
 11 claimant's "unexplained or inadequately explained failure to seek treatment" when
 12 evaluating credibility). Plaintiff reported that he had never been evaluated or treated by a
 13 psychiatrist and that he had never taken any psychotropic medication (*see AR.* 51, 455,
 14 746).

15 Finally, plaintiff argues that the ALJ improperly discredited his credibility by
 16 relying on an evaluation from March of 2011 -- two years before the hearing. However,
 17 this evaluation occurred during the relevant period of alleged disability, so the ALJ
 18 properly weighed this evidence along with all other testimony provided by plaintiff.

19 Therefore, the Court finds that the ALJ did not err in discounting plaintiff's
 20 testimony because he provided specific, clear, and convincing reasons supported by
 21 substantial evidence.

22 (3) **Did the Commissioner err in determining plaintiff's RFC?**

23 Plaintiff also argues that the ALJ erred in determining plaintiff's residual
 24 functional capacity ("RFC") because the ALJ failed to consider plaintiff's bilateral eye

1 blurriness (*see* Opening Brief, Dkt. 10, pp. 7-8). However, as noted above, plaintiff failed
2 to establish a medically determinable impairment, and the ALJ reasonably did not discuss
3 what was not significantly probative evidence. *See supra*, section 1. Therefore, there is no
4 reason to reverse this matter based on the ALJ's RFC.

5 CONCLUSION

6 Based on these reasons and the relevant record, the Court **ORDERS** that this
7 matter be **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g).

8 **JUDGMENT** should be for **defendant** and the case should be closed.

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10 Dated this 13th day of May, 2015.

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13 J. Richard Creatura
14 United States Magistrate Judge
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